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SUPREME COURT OF THE
UNITED STATES OF AMERICA

NO. 79-998

OCTOBER TERM, 1979

HAROLD GLICKMAN
& JAMES ROWE,

Petitioners

vs.

UNITED STATES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER S HANSON, Esq.
518 South Broadway
Santa Ana, California 92701
(714)558-0921
Member of the Bar, United States
Supreme Court

HOMER MASON, Esq.
P.O. Box 75367
Los Angeles, California 90075
(213)384-6726

Attorneys for the Petitioners

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THE U.S. 9th CIRCUIT ERRED IN FINDING NO DENIAL OF RIGHTS TO PETITIONERS IN THE DISTRICT COURT'S REFUSAL OF A FULL EVIDENTIARY HEARING IN BUTTE MONTANA ON JUNE 26, 1978 IN VIEW OF THE AFFIDAVITS ON FILE WHICH SHOWED (a) MENTAL DISABILITY/DEFECT IN GOVERNMENT INFORMANT GOLDMAN AND (b) FALSIFICATION AS ADMITTED BY GOLDMAN IN THE APRIL 4, 1977 TAPE RECORDING OF A TELEPHONE CONVERSATION GOLDMAN MADE TO PETITIONER GLICKMAN, SAID FALSIFICATION BEING DONE BY STATE/FEDERAL AGENTS. 23

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SUPREME COURT OF THE UNITED STATES

No.....

October Term, 1979

HAROLD GLICKMAN and
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vs.

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Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now the petitioners, Harold Glickman and James Rowe, by their attorneys Roger S. Hanson, and

Homer Mason, members of the bar of the United States Supreme Court, asking for a writ of certiorari directed to the United Stated Court of Appeals for the Ninth Circuit at San Francisco, California, to review that certain published opinion, **United States v. Glickman, et. al., ...F.2d.....(9th Cir. 1979)**, a copy of which is herewith attached to this petition for certiorari.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioners submit the following;

(a)

OPINION BELOW

The official report of the judgement herein sought review is **United States v. Glickman, et al., ... F.2d** ..... (9th Cir. 1979), dated June 27, 1979. A copy of that opinion is attached as Appendix "A".

A petition for rehearing and suggestion for hearing **en banc** was made and was denied by the same panel of the U.S. 9th Circuit on November 26, 1979. A copy of the Order of Denial is attached as Appendix "B".

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are;

(i) the opinion affirming petitioner's conviction

was entered June 27, 1979.

(ii) A rehearing and suggestion for hearing **en banc** was denied by the U.S. 9th Circuit on November 26, 1979

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1254 (d);

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(d) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ..."

Jurisdiction of this Honorable Court is further invoked because:

(a) the U.S. 9th Circuit has decided an important issue of law in Federal Criminal Procedure/Rules of Evidence/Burden of proof in denying a full evidentiary hearing where a prima facie showing is made that a government witness informant is mentally incompetent to consent to a telephone conversation recording, contrary to the rulings of the U.S. 5th Circuit in **United States v. Napier**, 451 F. 2d 552 (5th Cir. 1971), and **United States v. Elrod, 441 F.2d 353** (5th Cir. 1971), and the U.S. 7th Circuit in **Taylor v. United States, 487 F.2d 307** (7th Cir. 1973); thus a conflict on a major significant rule of evidence/procedures presented in the decisions of the various Circuit Courts of Appeal, warranting Grant of Certorari;

(b) The U.S. 9th Circuit has erroneously decided that **plain error** is not committed by a United States District Judge:

(1) failing to call a Federal Criminal Jury into open court to clear up a patent ambiguity in a written note sent from that jury to the judge indicating that they were confused on an issue of law;

(2) interpreting the ambiguity and responding to what the judge felt was being inquired about;

(3) losing the note that the judge sent to the jury, thus foreclosing accurate review of the issue, and substituting for the note actually sent a "reconstruction" of the note by his female law clerk, Diane Rotering, where the District Judge admitted on the record, after the petitioners were convicted, that the reconstructed note was inaccurate, but the "U.S. Court of Appeals isn't going to it pay any attention to it anyway".

and

(1) The U.S. 9th Circuit has erroneously sought to interpret the meaning of the jury's inquiry and sought to interpret whether the Judge's admitted erroneous response was accurate;

and

(2) plainly the response of the District Judge has misled the jury on a serious, key, significant rule of the law of Federal Criminal Conspiracy, all to the denial of Due Process of Law to these petitioners.

(c) the U.S. 9th Circuit has erroneously ruled that the petitioners were not denied their 6th Amendment Rights of Confrontation by the government losing the whereabouts of one **Ron Goldman** who was shown to

be suffering from a mental defect, who had agreed to tape telephone conversations he had with petitioner Glickman, where a demanded evidentiary hearing was held looking into the competence of Goldman.

(d) the U.S. 9th Circuit has failed to find error in the refusal by the District Judge of a full evidentiary hearing where affidavits were presented that indicated that mentally incompetent Government witness **Ron Goldman** had participated with state and government witnesses in alteration of the tape recording made of the key telephone conversation between **Goldman** and petitioner **Glickman**, where Federal authority **requires** such an evidentiary hearing. **Taylor v. United States**, 487 F.2d 307,308 (7th Cir. 1973)

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether in a Federal Criminal Trial when the defense makes a prima facie showing and contention that a government witness did not and could not give consent to taping and recording of a telephone conversation the U.S. District Judge may deny a full evidentiary hearing, where psychiatrists were then available to testify for the defense, on an initial reason, immediately shown to be false, that that government witness would not submit to examination by a government psychiatrist, within the meaning of **United States v. Napier** 451 F.2d 552 (5th Cir. 1971) and

United States v. Elrod, 441 F.2d 353 (5th Cir. 1971)?

2. Whether government witness **Goldman** was mentally incompetent as a matter of law to consent to the taping of his April 4, 1977 conversation with petitioner **Glickman**?

3. Whether petitioners were denied their rights under the 4th & 6th amendments to confront the government witness **Goldman** where the government, after using him to make & allow recording of telephone call and personal interviews, with petitioners on April 4 and April 8, thereafter lost him before trial and before the motion to Suppress Evidence under F.R. Crim. P.41?

5. Whether petitioners were Denied Due Process of law under the 5th amendment by the District Judge:

(a) failing to have the jury brought back into open court to clear up an obviously unclear and enigmatic inquiry of the jury on a key issue of the law of Federal Conspiracy;

(b) failing to preserve the written note that the District Judge used to "Answer" the jury's inquiry;

(c) having his law clerk "reconstruct the note" that he sent to the jury, from the law clerk's memory, which the Judge, after the petitioners were convicted, **admitted did not accurately state his answer**; and

(d) allowing the appellate record to go to the 9th Circuit on the admittedly erroneous answering note,

with the remark to trial counsel, "The Court of Appeals is not going to pay any attention to it" (i.e., the issue of the ambiguous jury inquiry and the erroneous reconstructed answer.)

6. Inasmuch as the record indicates that the U.S. 9th Circuit decided the issue on the face of their interpretation of the **ambiguous jury inquiry** and the **erroneous reconstructed answer**, which is erroneous as a matter of **law & fact** as a response to the jury's inquiry, was **plain error** committed by the judge which, in the context of this case, deprived the petitioners of Due Process of Law within the meaning of **Bollenbach v. United States** (1946), 326 U.S. 607, 612-613?

7. Whether, in a Federal Criminal Trial, where a key inquiry of the jury is not clear, may the trial judge during trial, and U.S. Court of Appeals, on appeal, engage in **speculative guessing**, (which interpretation really makes no sense at all) as to the meaning of the jury's interrogation which indicated that it was confused about a point of law.

8. Whether, in view of new facts discovered after trial wherein the government witness **Goldman** admitted to participation with state & federal agents in wilfully altering recorded tapes of his initial April 4, 1977 telephone conversation with petitioner **Glickman** may the District Judge deny an **evidentiary hearing** wherein live witness would be called to inquire into the alteration and suppression of the true tape, within the meaning of **Taylor v. United States** 487 F2d 307,308

(7th cir. 1973), **Brady v. Maryland**, 373 U.S. 83, and **United States v. Agurs**, 427 U.S. 96?

9. Whether, in a federal evidentiary hearing, may a U.S. District Judge hold an interview with the key government witness, **Goldman**, who had already admitted to complicity in falsifying tape recordings of the key April 4, 1977 phone conversation between himself and petitioner Glickman, **outside the presence of counsel**, where, later, the key witness **Goldman** refuses to answer key inquiries under oath propounded by defense counsel, where the District Judge then admits that the content of that interview was an admission by **Goldman** that he was "intimidated by Los Angeles Police" in cooperating with them in their effort to prosecute petitioner Glickman?

3. Whether in a Federal Criminal Trial the burden shifts to the Government to prove mental competency of a key witness once a prima facie showing has been made of mental incompetency by the defense?

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

FOURTH AMENDMENT

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon pro-

bable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be con-

fronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner Harold Glickman and James C. Rowe were charged as being the **sole conspirators** in a 2 man conspiracy to offer a bribe to Chief U.S. District Judge Albert Lee Stephens Jr. of the Central District of California, via an alleged girl friend of the Judge, one Diane Eagan; the bribe was allegedly $50,000 for the District Judge to give favorable considerations to a defendant Phillip Izsak, then awaiting sentence before Judge Stephens.

The government presented its case largely via clandestinely made tape recordings, one made April 4, 1977, and another dual channel recording made April 8, 1977.

At the April 4 1977 date, one **Ronald Goldman** allegedly freely consented to make a phone call to petitioner Harold Glickman and engage Glickman in conversation concerning the bribe. On April 8 1977, Goldman & Eagan, actually an undercover agent, were "wired for sound" and entered petitioner Glickman's restaurant, the **KINGS ARMS**, in North Hollywood California and discussed the alleged bribe.

Following convictions by jury at trial where both

tapes were admitted and played to the jury, petitioner Glickman learned that Goldman had admitted to altering both tapes in a complicity with Eagan and her associate in an effort to convict Glickman. Affadavits and counter-affadavits were filed which were in support of a motion for a new trial based on wilfully falsified evidence. **Napue v. Illinois, 360 U.S. 264, 269; Giglio v. United States,** 405 U.S. 150; **DeMarco v. United States,** 415 U.S. 449; **United States v. Agurs,** 427 U.S. 97.

Further, it was learned that **Goldman** suffered from a mental defect which likely precluded his giving of consent to the taping, and, allowed government agents to overcome his free will.

In July, 1975, the United States District Court for the District of Montana caused Ronald Goldman (aka Ronald Edgar Veatch) to be received at the United States Prison, McNeil Island for psychiatric examination pursuant to Title 18 U.S.C. Section 4244. R.T. Sargent, M.D., Chief of Psychiatric Service at McNeil Island, discovered that Goldman was diagnosed a Schizophrenic, Paranoid Type, by the Texas Department of Mental Health and Mental Retardation in April of 1973. Dr. Sargent further determined that the deterioration in Goldman's emotional functioning, and secondarily in intellectual functioning, was noticeable to Goldman's family, at least since 1967, and had been progressive. Dr. Sargent concluded by finding Goldman the subject of a Schizophrenic

Disorder in need of further hospital evaluation and treatment. (S.M.P.A. Exhibit "A").

In January of 1978, Goldman was evaluated by two psychiatrists, appointed by the Arizona Superior Court, to determine whether he was fit to stand trial on various state charges. Both psychiatrists agreed, during separate psychiatric evaluations, that Goldman (aka Samuel Paul Gamble) was incompetent to stand trial due to his debilitated mental state. Goldman was found by one of these psychiatrists to be suffering from a major mental illness the exact nature of which was unclear while the other psychatrist diagnosed Goldman as a Chronic Schizophrenic, Paranoid Type, which had been well documented in the past and was presently evident (S.M.P.A. Exhibits "B" and "C").

Thus, according to Goldman's own family, his emotional state had been deteriorating since 1967. He had been rejected for military serviced at age 17 because of emotional difficulties. He has been diagnosed as a chronic schizophrenic by psychiatrists in 1973, 1975 and 1978. He has been declared unfit to stand trial in 1975 and 1978 because of his chronic mental condition. The issue in the present case is, therefore, whether the informant Goldman possessed the mental capabilities with which to knowingly consent to have his conversations with petitioner recorded by government authorities.

The issue of whether an individual was mentally

competent to consent to a search by government authorities was first addressed by the court in **United States v. Elrod**, 441 F.2d 353 (5th Cir. 1971). In **Elrod**, the government appealed from the granting of defendant's Motion to Suppress Evidence obtained during the search of defendant's hotel room by government agents. The search was occasioned by the execution of a written consent form by the co-occupant of the hotel room.

At he Suppression Hearing, the court found that the co-occupant of the hotel room had a long history of mental illness; had been diagnosed a chronic schizophrenic; had been found incompetent to stand trial; and that these mental findings were made approximately eight months after the co-occupant consented to the search of his hotel room.

Based upon this substantial showing of the co-occupant's mental instability, the Court of Appeals held that where there is substantial doubt as to the consenter's mental capacity, a determination of the question of free and voluntary consent requires a determination that the person was mentally competent to understand the nature of his consent. The court further reasoned that this naturally entails an understanding by the consenter of the nature of the consequences of his act. **United States v. Elrod, supra**, at 355.

That court fashioned a principle in focusing on the mental competency of a consenter. The Court held at page 355:

"The question is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions."

In the present case, the record contains a veritable plethora of evidence exposing a history of major mental illness in the informant Goldman. This well-documented malady of Goldman's calls into serious question whether the informant could have realized "what he was doing and had a reasonable appreciation of the nature and significance of his actions" in recording his conversations with the petitioner.

This simple concept of appreciating the nature and significance of a consensual act becomes pivotal when the consenter is one who suffers from some mental disease that prevents the consenter from realizing the significance of his act. Prior to the purportedly voluntary recording by Goldman of his conversations with petitioner, he had been adjudged mentally incompetent to enter military service, incompetent to stand trial on federal charge, and incompetent to be sentenced. Subsequent to Goldman's alleged consensual recordings he was adjudged incompetent to stand trial. Six months prior to the June 26, 1978 hearing, one psychiatrist recommended Goldman be transferred to a locked in-patient facility for further evaluation and treatment of his major mental illness (S.M.P.A. Exhibit "C").

Despite this avalanche of expert medical opinions regarding Goldman's mental incompetence, the trial court did not conduct a judicial inquiry to determine whether Goldman was in fact capable of rendering consent to the instant recordings (R.T.N.T. 12, 15, 18, 22, 25, 35, 37-40). The court relied upon its denial of Petitioner's pre-trial Motion to Suppress in finding the informant consented to the recordings (R.T.N.T. 14, 15, 37,) and completely disregarded the newly discovered evidence.

The case of **United States v. Napier,** 145 F.2d 552 (5th Cir. 1971), involves facts remarkably similar to those in the present case. In **Napier,** an informant purportedly consented to the recording by government agents of incriminating telephone conversations between himself and defendant Napier regarding a conspiracy to import large quantities of marijuana. An evidentiary hearing was held to determine if the informant was competent to testify at trial. Evidence adduced at the hearing established that the informant had a long history of mental disorders and was incompetent to testify as a witness at trial. In spite of the informant's long history of mental disorders, the trial court in **Napier** admitted into evidence the incriminating recordings between the informant and Napier.

As in the present case, the recorded conversations between the informant and Napier constituted the essence of the government's case. The Court of Ap-

peals vacated the judgment of conviction and remanded the case to the District Court with directions to hold a full evidentiary hearing on the capacity of the informant to consent to the interception and recordation of the telephone conversations. **United States v. Napier, supra** at 554.

It becomes abundatedly evident from the rule stated in **Elrod** and **Napier**, involving remarkably similar fact situations to the instant case, that where the consenter to a search (interception of oral communication) has a history of mental illness, it is incumbent upon the court to hold an evidentiary hearing to ensure that the person was mentally competent to understand the nature of his consent.

In the present case, the findings and conclusions of three Psychiatric Evaluations provided the trial court a substantial basis for an evidentiary hearing to determine whether the informant Goldman understood the nature of his purported consent to the recording of his conversations with the petitioner. Unfortunately, the trial court chose to ignore any testimony from these three medical professionals (R.T.N.T. 13) and, chose instead to rely upon personal observation and conversation with the informant in adjudgeing Goldman "knows what he is doing" (R.T.N.T. 15, 16, 37). This ruling was made despite two psychiatrists recommending Goldman be committed for long term treatment of his mental disorder a scant six months earlier (S.M.P.A. Exhibits "B" and "C").

The trial court's actions are wholly inconsistent with the rule of **Elrod** and **Napier** and effectively prevented any meaningful evidentiary hearing on the informant Goldman's competency to consent to the recording of his conversations with petitioner. Thus, the trial court erred in failing to hold such evidentiary hearing.

Each of the above 2 subjects were the basis of a motion for a new trial and Evidentiary hearing in support thereof held on June 26, 1978 in visiting Judge William Murray's court in Butte, Montana. In fact that evidentiary hearing was never held on the sole grounds that, at its inception, Goldman refused to be examined by a Federal Psychiatrist and secondly, the court, having once ruled on the ability of Goldman to consent during a pre-trial suppression motion in Los Angeles, on much truncated evidence than was now newly discovered, the matter would not be reopened even in the face of the clearly alleged perjury.

Petitioner's Motion for New Trial was based upon the discovery of new evidence. Such discovery was occasioned by an investigator, under the employ of petitioner, locating the heretofore absent informant, Ronald Goldman, at the Pima County Jail in Tucson, Arizona. The investigator took a tape recorded statement from Goldman on January 18, 1978, wherein Goldman related that he was coerced into helping tape

his conversations with Glickman how he was told to direct his conversation with petitioner in the area of influencing a federal judge, how investigators from the Los Angeles County District Attorney's Office altered these tapes and finally that these same investigators prevented Goldman from testifying on behalf of Glickman at trial (D.M.N.T. Exhibit A).

Subsequent of Petitioner's trial, evidence was discovered that chronicled a long history of severe mental disorders that beset the Government's informant Ronald Goldman (aka Ronald Edgar Veatch and Samuel Paul Gamble). This evidence consisted of psychiatric evaluations by court-appointed psychiatrists which found informant Goldman incompetent to stand trial due to a major mental illness (S.M.P.A., Exhibits "A" through "E").

The first of these psychiatric evaluations was conducted in September of 1975 by R.T. Sargent, M.D., Chief, Psychiatric Service at the U.S.P., McNeil Island, who found that the informant had a history of mental illness which rendered him unsuitable for military service at age 17 (Goldman was 29 years old at the time of that evaluation). The September 1975 evaluation concluded that Goldman "suffers from a Schizophrenic Disorder, Paranoid Type, of rather long standing, and is in need of further hospital evaluation and treatment (S.M.P.A. Exhibit "A")."

The second evaluation was conducted in January of 1978, by John LaWall, M.D. an Assitant Professor

at the University of Arizona. That report found that the informant was incompetent to stand trial (for possession of a stolen motor vehicle and fraudulent scheme of artifice) due to a major mental illness, the exact nature of which was unclear (S.M.P.A. Exhibit "B").

The third psychiatric evaluation was also conducted in January of 1978. The informant's emotional health was scrutinized by David Gurland, M.D., Medical Director of the Psychiatric Services Center. Dr. Gurland stated in his report that Goldman "was markedly confused as to what year this was, stating it was 1962, as far as the month and day and in no way could he tell me the present time or in any way why he was in jail". Dr. Gurland found Goldman suffering from a Chronic Schizoprenic condition, Paranoid Type, well documented in the past and presently evident, rendering Goldman incompetent to stand trial. The examiner further concluded that the possibility of Goldman ever becoming competent to stand trial was certainly questionable (S.M.P.A. Exhibit "C").

Doctors Sargent and Gurland were present at the June 26, 1978 hearine in Butte, Montana. Despite the fact that these doctors were appointed by a federal district court and the Arizona Superior Court to evaluate Goldman, these psychiatrists were not allowed to testify since Goldman had refused to be examined by psychiatrist employed by the prosecution (R.T.N.T. 12).

At the June 26 Hearing, Goldman agreed to be examined by both a prosecution and defense psychiatrist (R.T.N.T. 24). Judge Murray denied a motion by the petitioner to adjourn the hearing in order that Goldman be examined by psychiatrists (R.T.N.T. 12).

Upon examination, Goldman was unable to recall consenting to the placing of a recording device on his person in April 1977 (R.T.N.T. 29). Goldman was unable to recall consenting to the recording of a telephone conversation with petitioner in April, 1977 (R.T.N.T. 30) or in fact any conversations with petitioner (R.T.N.T. 31).

Upon further examination, Goldman did not answer questions asking what year it is (R.T.N.T. 32), what state or city he was presently in (R.T.N.T. 31) or whether any person monitored telephone conversations between himself and the petitioner (R.T.N.T. 33).

Goldman was then excused from the witness stand after advising his counsel that he was getting sick (R.T.N.T. 35), and petitioner then made a motion that Doctors Sargent and Gurland who observed this testimony be allowed to testify concerning their opinions of Goldman's mental health from their observations of him in the courtroom. The motion was denied.

Judge Murray then reiterated that he was refusing to give the prosecution and defense the opportunity to have Goldman examined by psychiatrists, even though Goldman had consented (R.T.N.T. 38).

Judge Murray then denied the Motion for New Trial (R.T.N.T. 37, 38).

Petitioners assert that the ruling of the U.S. 9th Circuit in embracing these acts of the District Judge deprived them of due process of the law and creates a conflict in the U.S. Circuit Courts (5th & 7th vis-a-vis the 9th) as to when a Federal evidentiary hearing is mandated. In summary, petitioners make the following **contentions** which should cause this Honorable Court to Grant Certiorari to resolve and establish national guidelines in 2 key areas:

(a) when are federal evidentiary hearings required at motions for new trial where allegations of governmental perjury are established by sworn affadavit?

(b) when is plain error committed by the trial court where a jury makes an inquiry that reveals it is confused on a key issue of the law of Federal Conspiracy?

CONTENTIONS OF PETITIONERS BEFORE THE COURT ON PETITION FOR CERTIORARI

1. The District Court cannot deny a full evidentiary hearing on the issue of capacity of a governmental informant to give consent to the taping of a telephone call where the defense introduces affidavits of mental incapacity at times both before and after the consent within the meaning of **United States v.**

Napier,451 F. 2d 552 (5th Cir. 1971); **United States v. Elrod**, 441 F. 2d 353 (5th Cir. 1971); **Taylor v. United States**, 487 F. 2d 307 (7th Cir. 1973); **United States v. Morell**, 524 F. 2d 550 at 555 (2nd Cir. 1975).

2. The District Court and the Court of Appeals cannot purport to limit the scope of what oral evidence adduced both by direct and cross-examination **would be** concerning capacity to consent to taping of a phone conversation **by what is contained in a skeletal letter and skeletal offer of proof of a psychiatrist**, so as to deny an evidentiary hearing by the mandates of **United States v. Napier**, 451 F.2d 552 (5th Cir. 1971), and **United States v. Elrod**, 441 F. 2d 353 (5th Cir. 1971).

3. The District Court cannot purport to reconstruct its answer to an esoteric, enigmatic written inquiry of a criminal jury, where the court, realizing the inquiry ambiguity, failed to call the jury into open court and clear up the ambiguity, and where the court **lost** its written response to that inquiry and where the court's law clerk **differed** from the court's recollection of the event, and where the Court of Appeals decided to **adopt** the recollection of the law clerk as opposed to the recollection of the District Judge, within the commands of **Bollenbach v. United States**, 326 U.S. 607, 612-613 (1946).

4. The failure of the trial defense counsel to insist on clarification of an ambiguous written inquiry of a criminal jury in **open court**, and further ac-

quiescence in an erroneous response to that ambiguous inquiry deprived the defendants herein of due process of law and constituted the **cause** prong in **Wainwright v. Sykes**, 443 U.S. 72, requiring an analysis whether the defendants were caused **prejudice** resulting in their being convicted of a consporacy charge on erroneous jury instructions.

The applicable facts and law and arguement follow infra:

(f)

ARGUEMENT

I

THE U.S. 9TH CIRCUIT ERRED IN FINDING NO DENIAL OF RIGHTS TO PETITIONERS IN THE DISTRICT COURT'S REFUSAL OF A FULL EVIDENTIARY HEARING IN BUTTE MONTANA ON JUNE 26, 1978 IN VIEW OF THE AFFIDAVITS ON FILE WHICH SHOWED: (a) MENTAL DISABILITY/DEFECT IN GOVERNMENT INFORMANT GOLDMAN AND (b) FALSIFICATION AS ADMITTED BY GOLDMAN IN THE APRIL 4, 1977 TAPE RECORDING OF A TELEPHONE CONVERSATION GOLDMAN MADE TO PETITIONER GLICKMAN, SAID FALSIFICATION BEING DONE BY STATE/FEDERAL AGENTS.

As is well developed by this lengthy record, the government contended that petitioners Glickman and

Rowe conspired to attempt to bribe Chief United States District Judge Albert Lee Stephens of the Central District of California with $50,000 to give favorable sentence to one **Phillip Iszack**, a convicted defendant then awaiting sentence before Judge Stephens.

a. Allegedly, one **Ronald Goldman**, AKA **Ronald Veatch**, was asked to telephone appellant **Glickman** and discuss the bribe via telephone, **Goldman** allegedly voluntarily consenting to the taping of the conversation. Appellant **Glickman**, at trial, on a motion for a new trial, and on appeal to the U.S. Ninth Circuit on **denial** of that motion for new trial, vigorously asserted that **Ronald Goldman**, AKA: **Ronald Veatch**, did not and could not give consent because of a personal mental defect. Following appellants convictions, newly discovered evidence in the form of taped interviews between Investigator **Perry**, representing counsel for appellant **Glickman**, and **Ronald Goldman**, which were reduced to writing, revealed that **Goldman's** will was overpowered by police agents of the Los Angeles District Attorney's office who allegedly threatened **Goldman** with prosecution for crimes of his own unless he consented to the tapings. Further, the affidavits revealed alleged burglarization of Goldman's quarters, where tapes were secured, and overt and willful modification of the original **Goldman-Glickman** tapes, i.e., perjurously altering the tapes and suppression of the true nature of the

tapes. This was the tape of April 4, 1977, between **Glickman** and **Goldman**. A response to this motion for a new trial by the government, also by affidavit, equally vigorously denied alteration of tapes and suppression of evidence. The results of the foregoing **motion for a new trial supported by affidavits**, F.R. Crim. P.33, and response to that motion, composed of the counter affidavits, brought on an evidentiary hearing on June 26, 1978 in Butte, Montana at the personal courtroom of visiting Judge Murray of the District of Montana. The defense was amply armed with live witness psychiatrists to show that mental defect of Ronald Goldman precluded his giving of consent to tape the phone conversations of April 4, 1977 between **Goldman** and appellant **Harold Glickman**; further, defense investigator **Perry** and state investigators **Diane Eagan** and **Ronald Maus** were available to testify under oath subject to full cross-examination on the issue of voluntariness, alteration of tapes, and consent. The **court** over objection, held an **in camera** personal interview with **Goldman** not subject to cross-examination, and thereafter refused to hold any evidentiary hearing whatsoever in spite of the gross conflict in the affidavits then before the court, and in spite of the commanding authority of **United States v. Elrod**, 441 F. 2d 353 (5th Cir. 1971) and **United States v. Napier**, 451 F. 2d 552 (5th Cir. 1971); See also **Taylor v. United States**, 487 F. 2d 307, 308 (7th Cir. 1973) and **United States v. Morell**, 524 F. 2d 550 at

555 (2nd Cir. 1975). The purported reason was that the strangely behaving **Goldman** had recently refused to be examined by a government psychiatrist although that very morning **Goldman, AKA: Veatch,** agreed under oath to be examined, the court then again refusing the examination and evidentiary hearing.

(b) We apprehend this issue to be of such profound significance and importance that its resolution must be by this court granting certiorari, for a gross conflict now results in this 9th Circuit decision and the judicial reasoning of the 5th Circuit in **United States v. Napier,** 451 F. 2d 552 (5th Cir. 1971) and **United States v. Elrod,** 441 F. 2d 353 (5th Cir. 1971), ordinarily calling for a favorable grant of certiorari by this Honorable United States Supreme Court; the **corollary** reasoning is that this Honorable Court should grant certiorari to ensure that a decision aligning with due process confrontation of witnesses and proper establishment of the preliminary facts will come from this Honorable Court on this issue.

(c) The District Judge did not properly resolve the issue of conflict in the affidavits of the true relationship between **Ron Goldman** and investigators **Diane Eagan** and **Ron Maus.** It must be recalled, as set forth infra, that **Goldman** asserted that **Maus** and **Eagan** altered the tapes, clearly a Class I or Class II **Agurs** problem; See **United States v. Agurs,** 427 U.S. 97, 49 L. Ed. 2d 342, 96S. Ct. 2392, **United States v. Keogh,**

391 F. 2d 138, 146 (2nd Cir. 1968); and the standard therein is whether there is a reasonable possibility that the act of the government deprived the criminal defendant of due process of law. The initial **factual** and ultimately **legal** resolution must, of course, emanate solely from an evidentiary hearing and the June 26, 1978 evidentiary hearing in Butte, Montana did not resolve this issue. This court must and should grant certiorari and remand to the District Court for this resolution.

(d) Petitioners requested motion for an evidentiary hearing came in part from newly discovered evidence derived from petitioner Glickman's investigator, Norvan L. Perry, interviewing **Ronald Goldman** in Tucson Arizona, on January 18, 1978. **Goldman** had allegedly been "lost" by the government and could not be produced as a witness at trial before the Hon. William Murray, visiting District Judge from Montana, when the cause came on for trial on October 25, 1977. **Goldman** however, was arrested in Arizona and was interviewed by the defense. A synopsis of the salient results of that interview next follows:

(1.) **Goldman** was represented at the interview by Attorney Bell Calloway of the Arizona Bar.

(2.) The government/state agents had broken in to Goldman's home and had stolen some tapes.

(3.) They thereafter arrested Goldman and forced

him to cooperate in attempting to involve petitioner Glickman in a bribe of Federal Judge Stephens.

(4.) **Goldman** stated:

"Diane Egan and Ron Maus threatened me both with the charge of attempting to bribe a federal judge and to also arrest the other people in the conversations of the tapes which they had taken from my home. Their condition was that if I bring in other related charges also in this conversation which aren't related to bribery. But they assured me that if I would use any method, either legal or illegal, in essence, is what the conversation boiled down to, that they would not charge me with the crime of attempting to bribe a federal judge if I could lure Hal (Glickman) or Ed into a conversation relating to this, and I was consequently ..."

PERRY: What did you do at this point?

GOLDMAN: "I told them that I would help them at that point, and I was afeared that I would be held in connection with all those charges and might even be convicted, and I was afeared that my bond would be high enough that it would be ultimately impossible for my release. I went to and was supposed to get back in touch with these people the following day. Consequently I didn't do so and was apprehended again, supposedly under arrest."

PERRY: "By whom?"

GOLDMAN: "By officers, only I know they were

in plain clothes. The people who delivered me to the District Attorney's office and not to the jail. And again, this time they were a little more strong in their characterization of what would happen to me if I didn't further my agreements to assist them with entrapping Hal Glickman or Ed Nash, either one, any way that I could, and that I would either help them or I would immediately be prosecuted at that time on those charges and others."

(5.) **Goldman stated that the government agents wanted his help in altering, or falsifying the tapes recorded at a previous phone conversation:**

PERRY: "You mentioned prior to this recording a comment that said -- I'm trying to recall your words --there was tampering or doping of the tapes. What did you mean by that?"

GOLDMAN: I said doctoring the --

PERRY: Doctoring, that's right.

GOLDMAN: It means that while I was present they altered or erased certain conversations in the tapes.

PERRY: You talking about telephone tapes or this recording here?

GOLDMAN: No. At my home.

PERRY: Yes. OK. You are talking about taped telephone conversations?

GOLDMAN: Correct.

PERRY: This is where the doctoring took place?

GOLDMAN: In my home in my study on the top of my desk.

PERRY: Who's machine?

GOLDMAN: It was my machine.

PERRY: What kind do you have?

GOLDMAN: A good one. I think it's a realistic, or something like that.

PERRY: All right. Where is the machine?

GOLDMAN: The machine is currently being hid along with other tapes and stuff that I --

PERRY: If we ultimately really needed it you could produce that particular machine?

GOLDMAN: Yes I could.

PERRY: Who did the erasing?

GOLDMAN: Ronald Moss did, because Diane Eagan couldn't make the machine work right.

PERRY: But they both did what?

GOLDMAN: They listened to the tape and decided what they wanted to use in court and what they did not want to use in court is subsequently erased, that which wasn't favorable to them.

PERRY: In your presence?

GOLDMAN: In my presence.

PERRY: In your home?

GOLDMAN: In my home.

PERRY: Any this took place at, in April of 1977, sometime in April?

GOLDMAN: Correct.

PERRY: The tape itself should indicate the date

of your conversations with Hal, right?

GOLDMAN: Some of the dates I think were also altered. And, I know I had made some mistakes on the dates or times, they informed me that I had made some mistakes, and when I went downtown on one occasion I know they listened to it and changed the date on it. For what reason I don't know.

PERRY: They changed the date downtown?

GOLDMAN: Downtown in their office.

PERRY: You saw them do it?

GOLDMAN: I saw them do that.

PERRY: Whose voice went on the tape to show the correct date?

GOLDMAN: It was my voice 'cause they wanted to duplicate the tape where it would sound like it was an original.

PERRY: Are you telling me that there was a duplicate tape made downtown in your presence to get --

GOLDMAN: I'm telling you I was part of it.

PERRY: You participated?

GOLDMAN: Correct.

PERRY: What happened to the first tape, the original tape?

GOLDMAN: The ones they stole or the ones --

PERRY: The original tape which they are duplicating so that they changed the contents of the original tape, what happened to that one?

GOLDMAN: They informed me that they had to

change the tape to use it in court because it couldn't be used in court in its current condition. It wouldn't hold up in court.

PERRY: Therefore, on that basis, you in their presence, made a new tape?

GOLDMAN: Correct.

PERRY: Under their instructions?

GOLDMAN: Right.

PERRY: Under their supervision?

GOLDMAN: Correct.

(6.) Further, the government agents "wired Goldman for sound" and sent him into petitioner Glickman's restaurant, the "KINGS ARMS", and not being satisfied with contents of the tape which resulted, asked **Goldman** to aid them in altering the tape:

PERRY: Now, at the time that you were taping your interview or your conversations with Glickman in either in or outside of Diane Eagen's presence at the Kings Arm, did I understand you to say that there was some alterations in that, and if so, tell us about it.

GOLDMAN: Right. The alterations occurred after the meeting at the King Arms. I went to Gelson's Supermarket on Riverside Drive and met -- they were in their van and I was in my Lincoln, and they had apparently played it back and spent -- I don't know how many minutes we were there, a half an hour or something like that -- but it came out with a list dif-

ferent words they wanted me to reiterate to, the tape wasn't adequate or strong enough as it was, they wanted me to say certain things to alter the tape.

PERRY: Whose they?

GOLDMAN: Diane Eagen and Ron Moss.

PERRY: Were the questions written down?

GOLDMAN: The questions were written down and they gave me the high sign when to speak from the back of the van which I assume that's where the electronic stuff was.

PERRY: So they're telling you, they're giving you a high sign to read from their document certain words?

GOLDMAN: Right.

PERRY: And did you do it?

GOLDMAN: I did it.

PERRY: Did you get any sign when to stop and when to go?

GOLDMAN: Yes I did.

PERRY: Were you allowed time to -- and then asked to repeat yourself at any time?

GOLDMAN: I was told on a couple of different things that I should come out a little more forceably in my language, you know, speaking more clearly the tone from which I was speaking at.

PERRY: I assume that was either Eagen or Moss that told you that?

GOLDMAN: It was Diane Eagen.

PERRY: Was she in your car?

GOLDMAN: Yes she was.

PERRY: She was sitting beside you throughout this Gelson's parking lot transaction?

GOLDMAN: Correct.

PERRY: She could see the high sign?

GOLDMAN: Right.

PERRY: Would she make any comment or any statement at the time?

GOLDMAN: She would just tap the dash to let me see the high sign.

PERRY: Was she talking with you at any time you were in the car during this exchange?

GOLDMAN: Of course, on several occasions, she was talking.

PERRY: Have you ever heard those tapes replayed to you?

GOLDMAN: No, I was asked to come downtown.

PERRY: When?

GOLDMAN: I left in late April, I left the city. I was asked to come downtown and hear the product ... they informed me that I should come downtown and go over the stuff, and I had already been informed previously that I was going to have to testify against Hal in court, and I informed them I would not testify against Hal and they threatened me with being arrested and that was when I left town.

PERRY: Who did this?

GOLDMAN: Diane Eagen and Ron Moss.

(Eagen & Moss were state agents)

The foregoing consists of a portion of the taped interview used to secure an evidentiary hearing in Butte, Montana at the court of Judge Murray. The additional evidence was psychiatric physicians who would testify concerning Goldman's mental condition which foreclosed his ability to consent to the taping of the conversations and allowed his will to be overcome by the government agents.

All of the foregoing brought on the evidentiary hearing at which **Ronald Goldman** was to testify.

(e.) At the evidentiary hearing granted in Butte, Montana, on June 26, 1978, the following salient things occured:

(1.) Witness **Goldman** requested an "audience" with the District Judge, which was to be held outside the presence of attorneys for both sides:

"BE IT REMEMBERED that the hearing on Motion for New Trial was held before the Honorable W.D. Murray, commencing at 9:30 o'clock A.M. in the courtroom of the Federal Building, Butte, Montana, on June 26, 1978, with all counsel present and Defendant Harold Glickman present.

THE COURT: Is Mr. Goldman here?

(Mr. Goldman stood up in the back of the courtroom.)

THE COURT: Yes. You don't have an attorney at this point?

MR. GOLDMAN: I don't have one at this point, your honor.

THE COURT: No. I have a note from you which

you say you want to talk to me.

MR. GOLDMAN: Correct.

THE COURT: Well, do you realize that ...

MR GOLDMAN: I will waive the right to have counsel present, your honor.

THE COURT: Your waive that right and do you understand that you may be responsible for things that you tell me. The 5th amendment would protect you. You don't have to tell me anything.

MR. GOLDMAN: I understand that, your honor.

THE COURT: But you still want to have a conference with me?

MR. GOLDMAN: Yes, your honor, I do.

THE COURT: Do you want counsel for the parties to be present?

MR. GOLDMAN: No, your honor, I would like a very canded conversation between you and I.

THE COURT: Do you think -- I will appoint an attorney for you so that you may ...

MR. GOLDMAN: I don't think that will be necessary, your honor. I appreciate your consideration but I don't think that is applicable at this time.

THE COURT: Do you realize that what you may tell me in private, I may be required under my duty to disclose later in the proceedings?

MR. GOLDMAN: Yes, your honor, I am aware of that.

THE COURT: And you realize, you say, that I will appoint an attorney to advise you in this matter if

you wish me to.

MR. GOLDMAN: Like I said, I appreciate the consideration of the Court but I don't think it is necessary, your honor.

THE COURT: Very well, Court will be in recess. Yes?

MR O'NEILL: JAMES BRENNEN O'NEILL on behalf of the United States. On behalf of the Government I will lodge an objection to Mr. Goldman speaking with the court without counsel for the parties involved. As the Court is aware, Mr. Goldman is a man who has talked on both sides of the fence throughout the history of this case and it puts me as a representative of the Government at a loss as to how to react to whatever he may be doing. I don't think I can effectively represent the Government if Mr. Goldman goes in there alone without us knowing what he is saying.

THE COURT: Well, it's quite clear that I am going to disclose to you what he is saying to me. I will have to if he says anything that has any connection with the problem we have. I'll have to disclose it. So, I think that I am entitled at this point to have a meeting with Mr. Goldman and then disclose all the relevant matters that he may have disclosed to me.

MR. O'NEILL: Very well.

(2.) The District Judge reported to counsel that **Goldman** had told him that Los Angeles police had "intimidated him" and the District Judge appointed him **counsel** at that time drawn from the local Montana bar.

THE COURT: Well, gentlemen, I had a conversation with Mr. Goldman and he told me that the reason for the conflicting statements, transcripts, that have been produced is first that he was intimidated by the police officer of Los Angeles and so gave them any information the way they wanted him to give it to them. And that the reason he gave the other conflicting statement with reference to the matter was because he didn't know, he didn't know what to fear with reference to what might happen if he didn't satisfy Mr. Glickman. So, he said to the Court or to me, he said, "now, if you can guarantee that I will not be prosecuted in the Los Angeles Court and can have that case transferred to the Federal Court, then I will be willing to take the stand and testify". So, I advised him that there was no way I could stop the prosecution of the case in Los Angeles and that what he should have is the advice of an attorney. So, I have appointed an attorney for him and the attorney is now consulting with him. That is our situation. Now, let's proceed.

(3.) The Court was then advised that Goldman refused to be examined by a Federal Psychiatrist, and consequently he nullified hearing the battery of live psychiatric witnesses brought to Butte:

MR. CRANE: Your honor, I would like to make an inquiry of the Court, if I may. As I understand the law, once a strong inference has been made that a key Government witness did not have or might not have

had the relevant competency for a willing and knowing consent, that the burden switches to the Government to show that he did have that competency at the time that they alleged he gave his willing and knowing consent. It is our thoughts at this time that we would put on two psychiatrists; one who examined him before the events of the spring of 1977 and another who examined him after the events of 1977. Once their statements and their testimony has been submitted into the record, we feel at that point that the burden will switch to the Government and that they have a positive burden at that point to show the competency of Mr. Goldman at the time he gave the consent, or that they allege he gave the consent.

THE COURT: Well, the burden is always on the Government to show that the, to show the consent as I understand the law. That remains with the Government throughout all of the proceedings, that the consent was freely given.

MR. CRANE: Your honor, uh .....

THE COURT Now, do I understand – I understand, at least I think I understand that Goldman has refused to submit to a psychiatric examination by the Government.

MR. O'NEILL: That's correct, your honor. Before, Dr. Saul Faerstein this past week, I think it was last Tuesday, Dr. Faerstein attempted to examine him. Mr. Goldman refused to even state his name. Dr. Faerstein's declaration is attached to the

pleadings filed this morning and it essentially summarizes what happened when the defendant, excuse me, when Mr. Goldman was present before Dr. Faerstein. Basically, Dr. Faerstein attempted to conduct a normal psychiatric interview. Mr. Goldman would not answer any questions, he wouldn't even admit to his name. Dr. Faerstein was unable to conduct any examination nor form any opinion.

MR. FLIER: Your honor, our position in that matter is that we are presenting to the Court psychiatrists who were in fact appointed by the Courts in other proceedings and that they are not independent evaluations by the defense psychiatrists, so the issue of the Government not having a psychiatrist of its own choosing examine Goldman for the purpose of this proceeding is not germane to the proceeding.

THE COURT: Well, I will have to rule on this right now. The Government having been denied a psychiatric examination under the situation, I cannot permit any psychiatric testimony.

(4.) The Court believed that even if Goldman could not have given consent to the taping and even if the tapes were altered, the outcome of the trial would be identical, which is **not** the correct standard under **U.S.A. v. Agurs**, 427 U.S. 96 (class I, classII cases); **Brady v. Maryland**, 373 U.S. 83, 87; **Giglio v. United States**, 405 U.S. 150; **DeMarco v. United States**, 415 U.S. 449, 450; **U.S.A. v. Keogh**, 391 F. 2d 138, 146 (2nd Cir. 1968):

THE COURT: Well, aside from the fact that, you see, we have already had a hearing with reference to the consent of Goldman to the conversations. If you want to argue, well, it just appears to me that even if we went ahead and determined that the conversations, the telephone conversations, that he had were not consented to, would that have changed the result of the trial?

MR CRANE: Your honor ...

THE COURT: The important testimony and the important surveillance was that conducted by the witness Eagan. Wasn't that her name?

MR. CRANE: Yes, your honor.

THE COURT: When she had the bug on her in Mr. Glickman's office. And under all those circumstances, I just don't see any basis upon which I can say actually that the result of the trial would be any different. You know, the testimony of both Glickman and Rowe was just kind of almost ridiculous in the course of the trial. I don't know that there is anything that will warrant me to say that under all the circumstances that there would be any change in the result of the trial,

(5.) The 5th Circuit standards of Elrod and Napier (see infra) were urged, to no avail, upon the District Judge to face the mandated evidentiary hearing.

MR.CRANE: Your honor, I would like to point out to the Court that during the course of the trial, the Goldman tape, I will call it, and the Eagan tapes were

played and there were substantial differences and a very crucial difference was a telephone conversation that only Goldman had with Glickman and it was an April, I think April 8, 1977, call wherein Goldman called Glickman and they really, if you will, set out on that phone call what they were going to do visavis Judge Stephens. That call was critical. That call was extremely incriminating and we feel that without that call, there could have been a substantial difference in the trial. Your honor, we raised the point at the time of the trial.

(6.) An offer of proof of what the psychiatric testimony would be concerned with was proffered;

THE COURT: I don't pretend to be substituting that for a trained psychiatric examination but the law is clear to me on this kind of matter, the Court can make the decision with the advice of a psychiatrist. Primarily, it is the duty of the Judge to determine the competency.

MR. CRANE: In **Napier** the Court tried to do that and the 5th Circuit said "you can't do it, you've got to have a full hearing".

THE COURT: That's what I am willing to give you.

MR. CRANE: And we've got our psychiatrists here.

THE COURT: What's that?

MR. CRANE: We've got our psychiatrists here.

THE COURT: Yes but I am not going to permit

them to testify when the Government is denied the opportunity so let's -- I've ruled on it. They haven't yet served the subpoena ad testificandum down in Soledad so it doesn't appear there is any chance that Mr. Rowe be here.

MR MASON: It was my understanding it was they were going to try to get him here tomorrow for Tuesday. I know that they were working on that, your honor but we didn't want to delay the hearing. In any event if he gets here tomorrow, I'll be here.

THE COURT: It would seem to me that probably the only testimony that is going to presented here will be over with in another half hour if you call Mr. Goldman; who else is there to call?

MR. CRANE: There is no one else, your honor, just the psychiatrists who are here in Court.

THE COURT: So, there is no point in him coming if he can't, if he isn't here now.

MR. MASON: Your honor, I was kind of curious. On behalf of Mr. Rowe, we were wondering if the Court -- I understand the Court has already ruled but I have a suggestion, maybe an alternative thought since we have a few minutes to wait, with all due respect to the Court. I was wondering if you might allow defense, since we have had an opportunity to find records that were Court records with Court-appointed psychiatrists, if we might not necessarily consider it. If we might make an offer of proof and allow the Court to hear the testimony of these

psychiatrists only as an offer of proof.

THE COURT: Sure, make an offer of proof, that's fine.

MR. MASON: And allow them to testify so that ...

THE COURT: I don't know that I will allow them to testify. You can make the offer.

MR. MASON: I think Mr. Crane would then be in a better position to make that offer of proof as to what they would testify to should the Court allow them to. Even though the Court may disregard the testimony or not accept it or not wish to hear any more from them, if we at least had that opportunity I think ....

THE COURT If you wish to make an offer of proof that would be fine.

MR CRANE: Your honor, I am basing my offer of proof on the reports that I submitted in the hearing in Los Angeles, one by a Dr. Lawall in September of 1975 who is here in Court and, excuse me, in 1978, I am sorry, Dr. Lawall in 1978, January of 1978.

THE COURT: Where was that done, down in .....

MR. CRANE: That was made in Arizona.

THE COURT: In Arizona, yes.

MR. CRANE: And Dr. Sargent who is also here in Court and he examined Mr. Goldman in September of 1975. Taking Dr. Sargent first, he will testify that he examined Mr. Goldman over a 3 or 4 day period and as a result of his examination, he was of the opinion the Mr. Goldman -- may I just read it into the record?

MR. O'NEILL: This is all in the record. The report has been filed with the pleadings and it appears to be repetition and I don't understand the ...

MR. CRANE: Counsel, this is just an offer of proof for the record

THE COURT: It's an offer of proof for the record. Go ahead.

MR. O'NEILL: Very well.

MR. CRANE: Dr. Sargent's opinion in his analysis which is dated September 9, 1975, is that Mr. Goldman suffers from a Schizophrenic Disorder, Paranoid Type, of rather long standing and is in need of further hospital evaluation and treatment. Mr. Veatch's, that is one of his aliases, his past history and psychiatric findings indicate that there is a sufficient basis for concluding that he is presently incompetent to be sentenced. It is further the opinion of this psychiatrist that the defendant is not presently able to understand the nature of the proceeding against him and is not able to properly assist in his defense. We would further make an offer of proof that if permitted to call on him to testify that pursuant to his evaluation ....

MR. O'NEILL: Your honor, may I make an addition to that offer of proof?

THE COURT: No, this is his offer of proof.

MR. CRANE: That if called to testify, Dr. Lawall, and again I am just referring to his report of January 5, 1978, would testify that Mr. Goldman is incompe-

tent to stand trial, his incompetence is due to a major mental illness, the exact nature of which is unclear at this time.

THE COURT: The offer of proof is denied. Now do you wish to call Mr. Goldman?;

and the Court denied the oral evidence from the psychiatrists because **Goldman** would not submit to government psychiatric examinations.

(5.)**Goldman** was then called as a witness and agreed to be examined by a government psychiatrist:

MR. FLIER: Thank you, your honor. Mr. Goldman, my first question to you, sir, is would you be willing to allow yourself to be examined by a Government appointed psychiatrist to determine your mental competency? And also if you will, to be examined by a defense appointed psychiatrist also to determine the issue of your mental competency);

but the court **DENIED** a continuance in the hearing to allow the examination to be made

MR. FLIER: Because of Mr. Goldman's gracious consent to be examined, I would like to have the proceedings adjourned, if the Court will, thus giving the Government the right to have the Court appointed psychiatrist examine him. Therefore, then allowing us to have the same right and, therefore, then allowing the Court to take judicial notice of the psychiatric

records which are in fact lodged with the Court. Also, I might state we have for the purposes of expediency two very well trained psychiatrists who have previously examined Mr. Goldman, and we would be prepared to choose one as our psychiatrist since he is already here and hopefully the Government would choose the other, and that way we might be able to bring the Court the true basis on the issue of competency.

THE COURT: The motion is denied.

(6.) **GOLDMAN** then rambled on in a meaningless set of answers to questions

MR. FLIER: Mr. Goldman, in April of 1977, do you recall a phone conversation with Mr. Glickman concerning Judge Stephens of the Federal Bench in Los Angeles?

A I have no recall.

Q You don't recall that at all? That conversation, that telephone conversation? I don't mean the content of the conversation, I mean do you recall having a conversation with Mr. Glickman in April of 1977 concerning the subject matter of Federal Judge Stephens, without going into its content?

A I can't recall the date.

Q Well, without recalling the date, do you recall during the area of time that I have discussed with you having a conversation by telephone wherein

the subject matter of Federal Judge Stephens came up between yourself and Mr. Glickman, regardless of the date?

A I can't, I don't have any memory of the conversation.

Q All right. Do you recall Investigator Eagan and Investigator Maus, do you have any recall as to who those people are?

A What was the question?

Q Do you recall an Investigator Eagan or an Investigator Maus, do you recall who those two individuals are? Do you have any recall concerning them?

A Recall who they are, is that what you mean?

MR. FLIER: Yes, Maybe I will help you. One is, I believe, Diane Eagan, sometimes known as Diane to you, and one is Ron Maus, sometimes known as Ron to you. Do you recall now who those two individuals are?

A Yes, I recognize one of them.

Q Now, do you remember...

MR. O'NEILL: Will the record indicate that the defendant, excuse me, the witness pointed to someone in the Courtroom and I believe it was Investigator Maus who is present in the courtroom.

THE COURT: Sure.

MR. FLIER: Do you remember sometime in April of 1977 having anything to do with those people, having been with them?

MR. O'NEILL: Objection. I believe he has only recognized or identified one individual and that is Mr. Maus. The question should be framed in connection with Mr. Maus.

THE COURT: Yes.

Q You don't remember Diane Eagan? You have no recall as to who Diane Eagan is, is that your statement?

A I think I know who she is, yes.

Q Do you remember Diane Eagan and Ron Maus, do you remember having a meeting with them sometime in April of 1977?

A Beg your pardon?

Q Do you remember having a meeting with Diane Eagan and Ron Maus sometime around April 1977, not the specific date, just remembering, if you will, having a meeting with them.

A I can't remember the meeting.

Q Do you remember perhaps or now in April of 1977 placing upon your body a recording device or transmitting device?

A I have no memory of it, no recall.

Q You can't recall now ever having a recording device on your body sometime in April of 1977 or thereafter, is that correct?

A No, I can't.

Q Well, sir, in relationship to that, can you tell the Court now whether or not you ever gave consent to having that recording, to having a recording device

on your body in April or 1977?

MR. O'NEILL: Objection. Assumes facts not in evidence, your honor. In this hearing the witness has testified he doesn't recall any such event. Now he is asking him if he consented to something he doesn't recall would assume facts that are not in evidence at this proceeding.

THE COURT: Yes, it doesn't make much sence to me, counsel, but he can ask the question.

MR. GOLDMAN: What was the question?

MR. FLIER: I want to know, sir, if you ever recall giving consent to being wired in April of 1977 in order to have a conversation with Mr. Glickman? Did you ever give such a consent to any officer of the law such as Diane Eagan or Ron Maus? Do you understand that question?

A I don't understand what you are, repeat it again, please.

Q Surely. Do you recall ever giving consent to Diane Eagan or Ron Maus to placing a recording device on your body sometime in April of 1977?

A Do I recall?

Q Yes, presently?

A No, I don't.

Q I take it then you don't recall ever giving consent to having a recording device on your body in April of 1977 to Diane Eagan or Ron Maus, is that correct?

A I am sorry, I missed you again.

THE COURT: That's what he just testified to, counsel.

Q I would like to make sure that he heard me, your honor. This is a difficult witness to examine. I am hoping the Court will be lenient in that regard because of...

THE COURT: All right, go ahead.

Q What I am trying to find out, Mr. Goldman — do you prefer to be called Mr. Goldman for this proceeding?

A You can call me Deputy Dog, it doesn't make any difference.

Q Well, my best interest in remembering your name, I am going to call you Goldman, all right. Mr. Goldman, do you recall ever giving consent to Diane Eagan or Ron Maus to record a telephone conversation between yourself and Mr. Glickman in April of 1978, 1977?

A Not that I — I am sorry, I lost track of what you are saying.

Q I merely asked you, sir, if you remember giving consent to Diane Eagan or Ron Maus to allow them to record a telephone conversation you were to have with Hal Glickman in April of 1977?

A I can't recall it.

THE COURT: You said, "I can't recall it".

Q Did you ever give consent to Diane Eagan or Ron Maus at any time to allow them to record any conversation you had with Hal Glickman?

MR. O'NEILL: Objection. Asked and answered twice, your honor.

THE COURT: Yes. This is the last time. Go ahead. Do you recall it?

MR. GOLDMAN: What's that, your honor?

MR. FLIER: I asked him if he ever gave his consent.

MR. O'NEILL: Objection. It assumes facts not in evidence.

THE COURT: Go ahead. Ask the question, counsel, ask the question.

Q Did you ever give consent at any time to Diane Eagan or Ron Maus to allow them to record any conversation you had with Hal Glickman around April of 1977?

A No, I don't think so. I don't know, I can't remember.

Q Do you remember now what your state of mind was, how you were feeling in April of 1977?

A What was the question again? I am sorry, I am thinking about something else.

Q You are thinking about something that relates you to this lawsuit?

A No. What lawsuit?

MR. FLIER: This hearing that we are having now. Do you know where you are now?

A Well, I am here.

Q Well, where is here?

A Here in this room.

Q Where are we? Do you know what state we are in, do you know what city we are in?

(long pause)

MR. FLIER: May the record reflect there has ben no answer to the question?

THE COURT: Yes, it may.

Q Do you know Hal Glickman? I will repeat the question, you may not have heard it. Do you know who Hal Glickman is?

(no answer)

Q Would you like me to repeat the question again, Mr. Goldman? Or do you understand the question?

A What did you say, I am sorry?

Q I asked you whether or not you knew who Hal Glickman is? Do you know who Hal Glickman is?

(no answer)

Q I would like the record to reflect that there has been no answer to the question.

THE COURT: It may.

Q Do you know what year this is, Mr. Goldman? Right now, this year we are existing in. Do you know the number of this year?

(no answer)

Q I would like the record to reflect there has been no answer.

THE COURT: It may reflect it.

Q This witness seems now to be incapable of

answering the last series of questions which are very simple questions and has not been able to respond. This is the same witness that the Government is claiming gave a free and voluntary consent no less than, what, 14 months ago or whatever it was to a ...

THE COURT: Pardon me, are you through examining the witnes?

MR. FLIER: One moment, your honor. (Mr. Flier consulted with counsel for the defense.) Well, your honor, I would defer now to any further questions.

MR. MASON: I have a few questions, your honor, on behalf of Mr. Rowe. Mr. Goldman, do you recall any person monitoring your telephone conversations in April of 1977 betwen yourself and Mr. Glickman, the man who is seated at counsel table directly to your right from that witness stand?

(no answer)

MR. MASON: May the record reflect, your honor...

THE COURT: No answer.

Q Do you understand the nature of the question that I have just asked you, Mr. Goldman.

THE COURT: No answer.

Q Do you recall having any conversation with the gentleman that is seated to my right in the green suit, Mr. Maus, the District Attorney Investigator from Los Angeles County, in April of 1977?

(no answer)

MR. MASON: May the record reflect no answer.

THE COURT: There was no answer.

Q Do you recall either Diane Eagan or Mr. Maus asking you for your permission or your consent to wire you or monitor your conversation between yourself and Mr. Glickman, regarding Judge Stephens and attempting to influence him to rule in a certain way regarding a matter pending before him?

A I don't understand.

Q Do you recall having any type of conversations with Diane Eagan or with Mr. Maus, the gentleman seated to my right, regarding monitoring, that is overhearing or tape recording any conversations that you would have either personally or by phone between yourself and Mr. Glickman regarding Judge Stephens in a matter he had pending before him?

(long pause)

Q Do you understand the nature of the question?

A What was the question again?

Q Mr. Goldman, what we are asking is, do you recall telling either Diane Eagan or Mr. Maus that they could or they could not monitor, overhear, wire you so that they could hear what you would say to Mr. Glickman by phone or in person?

A Uh—(Mr. Goldman beckoned Mr. Haxby to come to the witness stand. Mr Haxby did and then had a conversation with Mr. Goldman.)

MR. O'NEILL: Your honor, would the record

please indicate that the witness is now conferring with his attorney.

THE COURT: Yes.

MR. O'NEILL: Thank you.

MR. HAXBY: The witness has just notified me that he feels that he is getting sick. He advised me that he doesn't feel good and has asked for an opportunity to step down from the stand.

THE COURT: Yes, he may. There is a bathroom back in the jury room if you want to go back there.
(The witness left the witness stand.)

MR. FLIER: Now that Mr. Goldman is going to take care of his physical problem, I would ask the Court to reconsider its ruling in relation to psychiatric testimony. I would ask leave of the Court. I know that we have two well qualified psychiatrists who have observed Mr. Goldman's testimony here in Court today and I would like the opportunity to call both of them to obtain...

THE COURT: Motion is denied.

(7.) Based on Goldman's presentation, the motion to have a government psychiatrist examine him was renewed and **DENIED.**

MR. FLIER: I want for the record to say, to obtain from them the information as to whether or not in their opinion he could have given consent to anything in April of 1977 based on their observations of this

court proceeding today.

THE COURT: Motion is denied. Is there anything further you need from this witness?

MR. CRANE: Your honor, I take it the Court is ruling, and I understand it so the answer is obvious, but for the purposes of the record I take it that you are refusing the defendant and the government the opportunity to have Mr. Goldman examined psychiatrically even though he has agreed to it?

THE COURT: Yes, at this point, at this time.

(f.) The trial cour cannot deny an evidentiary hearing on the issue of mental capacity to give consent to taping of a telephone conversation. United States v. Napier, 451 F. 2d 552 (5th Cir. 1971) Letter/affidavits of psychiatrists and a skeletal "offer of proof" cannot be used to proscribe an evidentiary hearing because no one can fully represent what direct/redirect/re-cross-examination of the witnesses (here 3 physicians brought to Butte, Montana to testify on this issue) will develop. In Napier, supra at 533, the 5th Circuit said:

"We have searched the record in vain for a specific finding by the District Court that Hannard, in fact, did have the capacity to consent and did consent to the recordations at the time he allowed them to be made.

"The only evidence bearing on this issue is the statement of the District Court made in connection with his holding that Hannard was mentally incompetent to testify as a witness in the trial. In that statement, the District Court said, "The man was incompetent to testify, he has a long history as indicated in all of these records. If he had testified, he would have made a shambles of this trial".

"There is no argument that the evidence as admitted was insufficient to convict. Neither is it denied that these recordings constituted the "guts of the government's case". Under these circumstances, we must vacate the judgment of conviction and remand the case to the District Court with directions to hold a full evidentiary hearing on the capacity of Hannard to consent to the interception and recordation of these telephone conversations. This Court has most recently discussed the problem of the effect of mental capacity on the ability to consent in United States v. Elrod & Wright, 5 Cir., 1971, 441 F.2d 353. As that opinion points out, the burden of proving mental capacity and voluntary consent is on the Government. If the evidence establishes such capacity and accompanying consent then Napier will again be sentenced according to the law upon the jury verdict previously rendered. If the evidence fails to establish such consent, then Napier must be awarded a new trial."

In a similar analysis of District Court efforts to proceed and decide via affidavit and thus illegal circumvention of an evidentiary hearing, the United States Court of Appeals for the 7th Circuit said in **Taylor v. United States**, 487 F. 2d 307, 308 (7th Cir. 1973):

"The Government's motion refers to "the position that this Court has taken with respect to the requirement of evidentiary hearing following applications similar (sic) to that of appellant" and cites as an example a summary order to that effect filed last April. This is disingenuous in the extreme. It is not novel doctrine peculiar to this court that when a federal prisoner raises an issue which would require a new trial if factually sustained, as the judge conceded to be the case here, See Giglio v. United States, 405 U.S. 150, 154-155, 92 S.Ct. 763, 31 L, Ed. 2d 104 (1972), and presents a sufficient affidavit in its support, an opposing affidavit by the Government is not part of "the files and records of the case" which can be taken to "conclusively show that the prisoner is entitled to no relief," within 28 U.S.C. 2255. The principle was established by the Supreme Court as long ago as Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941) and Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942). By this time the rule should be well

known to Assistant United States Attorneys, who ought not to lead courts into errors, and to federal trial judges, who ought not to make them. The result of what happened here is that this court has been burdened with an appeal that should never have had to be taken and, more important, that Taylor has been denied an evidentiary hearing he should have had a year ago".

Similarly, the 5th Circuit said in **United States** v. **Elrod**, 441 F. 2d 353 at 353 (1971) (5th Cir. 1971):

"While it is established that one can validly consent to a search, even though consent be given while that person is in custody, United States v. Mitchell, 1944, 322 U.S. 65,64 S.Ct. 896,88 L. Ed. 1140, whether such consent has been given is, in the first instance, a question of fact for the Trial Court, United States v. Page, 9 Cir., 1962, 302 F. 2d 81.

"The Government contends that there is "no evidence that Herbert Wright was insane at the time he consented to the search ***". At the outset this is wrapped up in the conclusory enigma of "insane" with its many meanings including, as perhaps suggested here, that of a bumbling idiot. The question is one of mental awareness so that the act of consent was the consensual act one who knew what he was doing and had a reasonable appreciation of the nature and

significance of his actions. In that light we reject this contention, as we find the record to contain sufficient evidence for the Trial Court reasonable to have reached the conclusion that Wright we mentally incompetent at the time that he signed the consent form.

"The Government also contends that "even if the Court were to find that Wright was so deranged at the time of the search that he could not have given his consent voluntarily ***the search ought not be held unlawful for that reason alone." This is a curious claim since in effect the Government is seeking warrantless searches through "consent" given by one who does not know what he is doing. Presumable it is a lamentation that to the burdens which now almost make a constitiutional seer out of a policeman on the beat will be added the esoteric functions of an amateur psychiatrist. No matter how genuine the belief of the officers is that the consenter is apparently of sound mind and deliberately acting, the search depending on his consent fails if it is judicially determined that he lacked mental capacity. It is not that the actions of the officers were imprudent or unfounded. It is that the key to validity-consent-is lacking for want of mental capacity, no matter how much concealed. "The criminal goes free, if he must, but it is the law that sets him free. Nothing can

destroy a Government more quickly than its failure to observe its own laws, or worse, its disregard of its own existence."

Mapp v. Ohio, 1961, 367 U.S. 643, 659, 81 S.Ct. 1684, 6 L. Ed. 1081, 1092.

"While it is true that the Judge expressed it as not being able to find whether or not Wright had the requisite mental capacity, this is no aid to the Government. Consent means knowing approval. The Government had to show this to sustain validity. On this record it would fail in this burden either by a finding of incompetency or one of equilibrium."

Plainly, therefore, this court should reverse and remand to the District Court for the required Evidentiary Hearing. This Court should enunciate a national standard & mandate to govern the holding of evidentiary hearings in federal criminal cases, where mental competency is placed in issue.

II

THE DISTRICT JUDGE ERRED IN FAILING TO CALL INTO OPEN COURT THE TRIAL JURY TO CLEAR UP A PATENT AMBIGUITY IN A POINT OF LAW. THE COURT **PERSONALLY** TRIED TO INTERPRET THE REQUEST AND ANSWERED IT BY A NOTE NOW LOST. THE JUDGES LAW CLERK SOUGHT TO RECONSTRUCT THAT NOTE BUT THE JUDGE DENIED ITS ACCURACY, BUT IT WAS THE INACCURATE VERSION THAT THE U.S. 9TH CIRCUIT SOUGHT TO INTERPRET IN ITS OPINION IN RULING ON THE "PLAIN ERROR" IN THE JURY INSTRUCTIONS. THIS COURT SHOULD GRANT CERTIORARI TO ENUNCIATE IMPORTANT STANDARDS FOR FEDERAL CRIMINAL TRIALS WHERE THE JURY IS PLAINLY CONFUSED ON AN ISSUE OF LAW

The Trial Court's Instructions to the Jury on the Law of Conspiracy Were Ambiguous, a Misstatement of the Law and Misleading Thus Constituting Plain Error.

The trial court instructed the jury on the law of conspiracy at the conclusion of all the evidence. The court did not tailor the instructions to the evidence introduced at trial nor did the court instruct the jury as to what persons may be included in the conspiracy charge.

During deliberation, the jury sent a note to the trial judge seeking a clarification of the instructions on conspiracy. That note read:

"Judge Murray—
Is (sic) the conspiracy charge against either defendants (sic) mean that the conspiracy has to be between Glickman and Rowe only?" (C.T. 328).

Although somewhat unintelligible, it is obvious from the content of the note that the jury was confused in both the law of conspiracy and the parties chargeable with conspiracy in the present case.

The only evidence introduced at trial with respect to a possible conspiracy involved Glickman and Rowe, and the informant Goldman. However, one who feigns participation in a conspiracy and therefore is unable to be a co-conspirator as a matter of law. See **Sears v. United States,** 343 F.2d 139 (5th Cir. 1964); **United States v. Rosenblatt,** 554 F.2d 36 (2nd Cir. 1977). Thus, Goldman, as a government informant, lacked the requisite intent to further the conspiracy and therefore could not be a co-conspirator.

It is abundatly clear from the jury's note that they did not understand this distinction or they felt other persons could form a conspiracy even though no such evidence was introduced by the government. As a legal necessity, the only conspiracy that the jury could find in the present case must have been between Glickman and Rowe, since Goldman lacked the requisite intent to be a co-conspirator and the prosecution did not introduce any evidence of others involved in the alleged conspiracy.

The response by Judge Murray to the jury note read as follows:

"No, There can be no conviction of one defendant without conviction of the other defendant in this case." (C.T. 330).

The trial court's response of "no" to the jury's inquiry, whether the conspiracy must be between Glickman and Rowe only, is incorrect as a matter of law because the only evidence of a conspiracy upon which the jury could find guilt was a conspiracy between Glickman and Rowe. As stated before, Goldman lacked the requisite intent and no evidence was adduced at trial implicating any other possible co-conspirators.

Thus, by answering "no", the trial court enabled the jury to find a conspiracy between Glickman and Goldman, or Rowe and Goldman, or any two persons mentioned in any of the tape recordings played to the jury. Although the jury found the existence of a conspiracy in the present case, the possible parties to the conspiracy are as numerous as the permutations of all persons mentioned during the course of the trial.

The additional response by the trial court that "there can be no conviction of one defendant without conviction of the other defendant in this case" is clear and manifest error. If the jury found that Rowe was guilty of the substantive charge (18 U.S.C. §1503) of

corruptly endeavoring to influence Judge Stephens they need not also find Glickman guilty of the substantive charge & vice versa. The trial court's response, although perhaps intended only to apply to the conspiracy charge, nevertheless states that if the jury finds one defendant guilty then it must find both guilty in this case. This language clearly includes the substantive charge and, as such, is an erroneous statement of the law since no agency theory applies in the substantive charge as it does in conspiracy.

Carried to its logical conclusion, the trial court's response enabled the jury to find a conspiracy between, e.g., defendant Rowe and the informant Goldman. Having found Rowe guilty the jury necessarily would have to find Glickman guilty pursuant to Judge Murray's instruction.

The law is well-stated in the area of confusing and erroneous instructions to juries. In **United States v. Bagby**, 451 F.2d 920, 927 (9th Cir. 1971), the 9th Circuit Court stated:

"We have more than once held that erroneous instructions are cause for reversal, even absent defendant's timely objection, if plain error affecting substantial right of the defendant occurred."

In addition, This Honorable Court has emphasized that a conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue. **Bollenbach v. United States**, 326 U.S. 607 (1946). Even assuming the trial court's original instruction to

the jury regarding conspiracy was correct, the court's response to the jury's inquiry was clearly wrong and where two instructions are given to the jury, one erroneous and prejugicial and the other correct, it is impossible to tell which one the jury followed. Thus, the giving of an erroneous instruction constitutes reversible error. **Nicola v. United States**, 72 F.2d 780 (3rd Cir. 1934); **United States v. Reid**, 517 F.2d 953 (2nd Cir. 1975).

Here, the jury's note indicated a confusion as to the law of conspiracy. The trial court's response was ambiguous and contained clear misstatements of the law. Therefore, the right of Appellants to due process of law was vitiated by the trial court's instruction thus constituting plain error and requiring reversal of Appellant's conviction.

A hearing is necessary to properly resolve either outright error, or a guess at interpretations of what was sought by the jury and what was responded to by the court vis-a-vis the recollection of the trial judge's law clerk, Diane Rotering; as we note below, this court cannot now attempt to interpret the enigmatic, esoteric note sent by the jury and the response to that note by the District Judge, said response now not even being in existence.

The following facts seem self-evident:

1. After deliberating, the jury sent the following note to the court:

"Judge Murray—

Is (sic) the conspiracy charge against either defendants(sic)mean that the conspiracy has to be between Glickman and Rowe only?"

2. The court did not call the jury into open court in spite of the salient, patent ambiguity in this esoteric inquiry; the court proceeded to answer the vague inquiry by an erroneous response, which for the record, is **law clerk Diane Rotering's recollection** of what the judge sent in:

"No. There can be no conviction of one defendant without conviction of the other defendant in this case."

3. Plainly, the answer "no" is erroneous, for as the opinion of the 9th circuit court sets forth at page , line :

"The evidence adduced at trial showed that only Glickman and Rowe were members of this conspiracy. Both Rowe and Glickman insisted at the April 8th meeting in **Glickman's** office that only **Glickman, Rowe, informant Goldman** and **undercover agent Eagan** were aware of the plan..."

Therefore, the court, having heard the evidence, to be correct, must have answered yes, the sole possible conspiracy, if any at all, has to be between Glickman and Rowe only.

4. The court in answering "No" clearly opened up in the jury's mind that possibility that **either** Rowe or Glickman could be teamed alone

with, say, Iszak, his parents, or others unnamed in a conspiracy, and that the answer "No" stood alone from the sentence which followed it, that sentence being"

"...There can be no conviction of one defendant without conviction of the other defendant in this case..."

5. Plainly, this last sentence could have directed the jury to convict one of the defendants **if** they were sure, beyond a reasonable doubt that the other, more culpable defendant may have been found guilty **beyond a reasonable doubt** by the jury, but the jury could have entertained a reasonable doubt about the other one **absent** the trial judge's command that the conviction of one **required** the conviction of the other.

Strangely enough the 9th Circuit Court of Appeals approaches it from the other side of the coin :

"...even on the appellants reading of the note the government could not obtain a conviction of one defendant unless it presented evidence of guilt sufficient to convict the other defendant as well..." .

6. Yet, it must be admitted that a jury having beyond reasonable doubt convictions on one defendant in the conspiracy could not help but bring the other one along under the court's instructions. At least under the severe ambiguity of the

case, **that is a distinct possibility**, and the court failed to clear away the jury's confusion "with concrete accuracy," **Bollenbach v. United States,** 326 U.S. 607, 612-613.

In view of the clear command of **Bollenbach v. United States, 326 U.S. 607, 612-613, certiorari must be accorded by this Honorable Court to insure that appellants rights are afforded.**

For all of our effort we are completely mystified by the panel's guess and conclusion as to what the jury was inquiring about, viz:

> "...it appears that the jury wanted to know whether it was required to find Glickman and Rowe not guilty of the conspiracy if it determined that there were members of the conspiracy other than Glickman and Rowe..."

What in the note suggests the above conclusion surely remains opaque to this counsel. But the final analysis suggests that all are guessing as to the jury's problem and the forever-now-lost court's "answer", and to insure protection to these defendants, a new trial must be ordered.

Failure of trial defense counsel to properly insure that open court resolution of the ambiguity occurred constitutes ineffective assistance of counsel.

Wainwright v. Sykes, 433 U.S. 72; **Cooper v. Fitzharris,** 551 F. 2d 1115.

Thus, a hearing should be granted to resolve the serious issue of whether the recollection of a District

Judge as to the contents of a note that he sent into the jury must be overridden by the recollection of his law clerk, Diane Rotering, where that note is lost and its contents attempted to be reconstructed by the court and his law clerk; further, the issue of whether **defense** counsel, in allegedly acquiescing in this unusual process of failing to make a record in open court where defense counsel and the government could have an opportunity to clear up the patent ambiguity of the note written by the jury foreman, viz:

"Judge Murray—

> Is (sic) the conspiracy charge against either defendants(sic) mean that the conspiracy has to be between Glickman and Rowe only?"

and its non-available response which was constructed from conflicting memories of Federal Judge Murray and his law clerk Diane Rotering, constituted ineffective assistance of counsel within thje meaning and general reasoning of the **cause** and **prejudice** prongs of **Wainwright v. Sykes,** 433 U.S. 72, where the 9th Circuit states:

> "Because the appellant did not object, to the supplementary jury instruction at trial, it cannot be challenged on appeal unless the instruction constituted plain error...".

Under the reasoning of **Wainwright v. Sykes,** (28 U.S.C. 2254 for state prisoners), trial level attorney incompetence can constitute the **cause** for failure to

lodge a procedural objection in a timely manner; the cause can allow a consideration of prejudice if that cause can be determined to be ineffective assistance of counsel. A hearing should be granted wherein the mandate of **Wainwright v. Sykes**, 433 U.S. 72, can be applied to the issue of failure of trial defense counsel to insure that the integrities of the jury inquiry-trial judge response was met at the requisite level to insure fairness to these defendants.

III

Petitioner Glickman's Sixth Amendment Right to Confrontation Was Denied at Both the Suppression Hearing and Trial

Tape recorded conversations between petitioner Glickman and informant Goldman were admitted in evidence and played for the jury at trial. Prior to trial, Petitioner moved to suppress these recordings on the ground Goldman did not voluntarily consent to the recordings.

At the suppression hearing, the government relied exclusively upon the hearsay statements of Officer Jerry Thomas, Deputy District Attorney Robert Schirn and Investigator Ronald Maus that the informant, Ronald Goldman, consented to the tape recording of his conversations with petitioner. The government did not produce Goldman at the hearing thus precluding any cross-examination of Goldman by petitioner with respect to his purported consent. The motion to suppress the tape recordings was subsequently denied.

At trial, the government again failed to procure the presence of Goldman and thus petitioner was again unable to cross-examine the informant as to the veracity and authenticity of the tape recordings and his consent thereto.

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him ..."

Petitioner was foreclosed from examining Goldman on the voluntariness of his consent to record his conversations with Petitioner by the government's abject failure to procure the presence of Goldman at the suppression hearing and trial.

The out-of-court statements in the present case, alleging the consent of Goldman for the tape recordings, effectively foreclosed the Petitioners defense of non-consent to the recordings which would have barred their use at trial. How was Petitioner to cogently examine the informant as to his consent when he was not there to testify? This dilemma is the very sort which the right to confrontation addresses itself. This Sixth Amendment right insures that a defendant will have the opportunity to confront those witnesses against him.

Here, the substance of the government's case-in-chief are the tape recordings allegedly consented to by Goldman. Had Goldman not consented to these recor-

dings, they would be inadmissible as evidence since not procured in conformity with 18 U.S.C. 2511 et seq. Had these recordings been suppressed, the government would have had little evidence with which to proceed against the Petitioners.

Thus, the opportunity to question Goldman regarding his consent was crucial to the Petitioner's defense. No cross-examination of any of the prosecution's witnesses would strike at the heart of the consent issue. Such cross-examination would only elicit further hearsay.

Further, the tape recordings constituted out-of-court statements thus raising issue of their veracity and authenticity. Here again, how can the informant be questioned as to the veracity and authenticity of the tapes when he is not available at trial?

This critical issue of the right to cross-examine the declarant of extrajudicial statements that are devastating and crucial to the accused was addressed in the case of **Simmons v. United States,** 440 F.2d 980 (7th Cir. 1971). There the court reasoned:

"It seems to us, however, that where an extrajudical declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that defendant could have subpoenaed him, does not, in our opinion, suffice." (**Id.** at 981).

This reasoning has been affirmed in **Park v. Huff,** 493 F.2d 923 (5th Cir. 1974). That court held at page 934:

> "....where the declarants were not shown to be unavailable and where their out-of-court statements were not supported by significant indicia of reliability and were 'crucial' and 'devastating', the accused was denied his sixth amendment right of confrontation when the declarants were not produced as witnesses by the State."

Although **Park** is distinguishable from the present case in that there no showing of the declarant's unavailability was made, the reasoning in **Park** is no less applicable to the instant case. Namely, how can an accused present an effective defense when the declarant of "devastating" and "crucial" extrajudicial statements is unable to be cross-examined by the accused? The Sixth Amendment would provide a hollow assurance if an accused is not guaranteed the right to confront the declarant of out-of-court statements critical to the accused's defense.

It is therefore respectfully submitted that Petitioner was denied his Sixth Amendment right of confrontation when the government failed to produce its informant Goldman at both the Suppression Hearing and the Trial. Certiorari should be granted.

CONCLUSIONS

For each and every one of the foregoing issues facts, arguements, and authorities and because of the conflict between the U.S. 5th & 7th Circuits and the U.S. 9th Circuit on when a Federal evidentiary hearing is mandated, this Honorable Court should grant certiorari to the United States Court of Appeals for the 9th Circuit.

DATED: December 24, 1979, at Santa Ana, and Los Angeles, California.

Respectfully submitted,

ROGER S. HANSON
and HOMER MASON
Members of the Bar, U.S.
Supreme Court,

Attorneys for Petitioners,
Harold Glickman,
and James Rowe.

APPENDIX "A"

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	**No. 78-1087**
		78-2498
HAROLD GLICKMAN,		
aka HAL GLICKMAN,	)	
Defendant-Appellant.	)	

OPINION

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	**No. 78-1391**
JAMES ROWE,	)	**78-2500**
Defendant-Appellant.	)	

Appeal from the
United States District Court
for the Central District
of California

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge.

*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation

TRASK, Circuit Judge:

Harold Glickman and James Rowe appeal their convictions of one count each of conspiracy, in violation of 18 U.S.C. § 371, and of corruptly endeavoring to influence an officer of a court of the United States, in violation of 18 U.S.C. § 1503. The object of the conspiracy was to offer $50,000 to a federal district court judge to obtain favorable treatment in the sentencing or bail status of a defendant in a criminal prosecution then pending before the district court. They also appeal from the denial of their motions for a new trial based upon newly discovered evidence. We affirm.

The appellants raise the following issues on appeal: (1) whether appellant Glickman was denied his sixth amendment right to confrontation by the failure of informant Goldman to appear at trial; (2) whether it was proper to admit the testimony of an investigator stating that she had contacted the county coroner to determine whether Goldman was dead; (3) whether the evidence was sufficient to support Rowe's conviction; (4) whether the court properly instructed the jury on the law of conspiracy; (5) whether appellants had the right to an evidentiary hearing on the capacity of Goldman to consent to act as an informant; and (6) whether the record contains conclusive evidence of Goldman's incompetency to consent.

On February 23, 1977, Ron Goldman, an inmate at the Los Angeles County Jail, told Jerry Thomas of the Los Angeles Police Department that he would be willing to help obtain evidence implicating Glickman in a cocaine operation. For his cooperation, Goldman was promised a recommendation that he be released on his own recognizance.

Goldman told Thomas on March 24, 1977, that Glickman had informed him that he wanted Goldman to determine whether a United States district court judge would, in exchange for $75,000, grant probation to Phil Izsak, a defendant awaiting sentencing.

At a meeting on March 30, 1977, attended by Goldman, Thomas, Deputy District Attorney Robert Schirn, and two district attorney investigators, Diane Eagan and Ronald Maus, it was agreed that Goldman would contact Glickman and that Eagan would be used as a "contact" with the district court judge. No threats or promises were made to Goldman.

On April 4, 1977, Goldman called Glickman and made a tape recording of the conversation. Goldman said that the best way to get to the judge was through the judge's girlfriend. Glickman told Goldman to contact the girlfriend. When Goldman suggested that $10,000 might be necessary to pay the judge, Glickman stated that the money would be given. The transcript of this conversation was admitted at trial only against Glickman and the jury was so instructed.

At 11:00 a.m. on April 8, 1977, Goldman called Glickman and arranged for Glickman to meet later in the day with Eagan, who Goldman said was the girlfriend of the district court judge. At 4:00 p.m. Goldman and Eagan, equipped with transmitters, came to Glickman's office at the King's Arms Restaurant in North Hollywood and there met with Glickman and Rowe. Investigator Maus placed two receivers and two tape recorders in a Ford van and recorded the whole meeting.

The discussion at the meeting centered around how much money would be required to effectuate the bribe, who would provide the money, how the payoff would be made, concern over the number of people aware of the scheme, and, after Eagan left the meeting, concern that she was an undercover police investigator. Glickman stated that Izsak's parents would provide the money. It was agreed that the money would be paid to the judge through Eagan. Both Glickman and Rowe insisted that the only persons aware of the scheme were the four present at the meeting, and that neither Izsak nor his parents were told of the bribery. After Eagan left the meeting, Glickman and Rowe expressed concern that Eagan was an undercover agent and that they might be prosecuted for attempting to bribe a federal judge.

I

Before trial, Glickman moved to suppress the recordings of the telephone conversation between Glickman and Goldman on April 4, 1977, and of the meeting at Glickman's office on April 8, 1977, on the ground that Goldman did not voluntarily consent to the recordings. At the suppression hearing, the government introduced testimony of Officer Thomas, Deputy District Attorney Schirn, and Investigator Maus that Goldman had consented to the tape recording of his conversations with Glickman. Maus, at the hearing and at trial, and Eagan at trial, testified that, despite diligent efforts, they had been unable to locate Goldman. Glickman contends that the government's failure to procure the presence of Goldman, deprived him of his sixth amendment right to cross-examine Goldman regarding the veracity and authenticity of the tape recordings and his consent thereto. This argument is meritless.

This court in **United States v. Hart**, 546 F.2d 798, 799 (9th Cir. 1976), **cert. denied**, 429 U.S. 1120 (1977), held that the government is not a "guarantor" of the presence of an informant at trial. The government is required only to use reasonable efforts to produce the informant, upon a proper request by the defendant. **Id.** The trial court's findings that the government has met its burden to produce the informant should be sustained unless clearly erroneous. **Id.** at 801.

Here, the trial court was not clearly erroneous in finding that the government had used reasonable efforts to produce the informant. The government introduced testimony of three witnesses at the suppression hearing detailing the government's efforts to locate Goldman. In addition to conducting a number of interviews of acquaintances and relatives of Goldman, the government issued a warrant against Goldman charging unlawful flight to avoid prosecution by California authorities and entered Goldman's name in the National Crime Index Computer. We have examined the record of the supression hearing and trial and hold that there was abundant evidence to support the trial court's finding that the government met its burden. (Footnote 1)

II

Glickman contends that the testimony of Investigator Eagan linked him to a crime not charged in the indictment and constituted prejudicial error requiring reversal. The relevant testimony is as follows:

1. The cases cited by Glickman, *Simmons v. United States*, 440 F.2d 890 (7th Cir. 1971), and *Park v. Huff*, 493 F.2d 923 (5th Cir. 1974), are inapposite. The *Park* opinion cited by Glickman has been withdrawn and a new en banc opinion subsituted. *Park v. Huff*, 506 F.2d 849 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 824 (1975). The language cited by Glickman is no longer in the newer opinion. *Simmons* is distinguishable because there the government made no effort to locate a declarant.

Q. Did you make any inquiries at any time with the County Coroner's Office?

A. Yes, I contacted them also on that 9th of May.

Q. What was your purpose in contacting the County Coroner's Office?

A. To ascertain whether Mr. Goldman was dead.

Glickman alleges that the "obvious inference" from Eagan's testimony is that he might have killed Goldman to prevent Goldman from testifying at trial.

Glickman's theory is unpersuasive. Under Hart, supra, the government had the burden of showing that it had made reasonable efforts to produce Goldman. Eagan's testimony regarding the coroner's office was introduced to show that the government had made reasonable efforts to locate Goldman. The government's attempt to show that it had discharged its burden included two pages of testimony by Investigator Maus and six pages of testimony by Eagan. The check of the coroner's office was merely a routine investigative procedure. Eagan did not even hint that Glickman or Rowe threatened or harmed Goldman. Moreover, because Eagan testified that Goldman's body was not found at the coroner's office, there was no evidence of a crime with which to connect the appellants.

Glickman further contends that the government made a second improper reference to his character during closing argument. There the government, referring to Eagan's presence at the meeting stated:

"She was in a very dangerous position . . . ." Counsel for Glickman objected to this statement and the objection was sustained. Glickman alleges that the government's statement was an "obvious reference" that he was a dangerous person and constituted an attempt to convict him by establishing bad character.

The error, if any, was harmless. The trial court immediately sustained the objection to the prosecutor's statement and in its instructions to the jury admonished it that any evidence to which an objection was sustained by the court must be entirely disregarded and that statements and arguments of counsel are not evidence. **See United States v. Cordova**, 537 F.2d 1073, 1077 (9th Cir.), **cert. denied**, 429 U.S. 960 (1976); **United States v. Wycoff**, 545 F.2d 679, 682 (9th Cir. 1976), **cert. denied**, 429 U.S. 1105 (1977). **Furthermore, the evidence of Glickman's guilt was overwhelming. See Cordova**, 537 F.2d at 1077; **Wycoff**, 545 F.2d at 682.

III

Rowe alleges that the evidence is insufficient to convict him. He urges that the only evidence adduced against him concerned his presence at the April 8th meeting and that he did very little talking at the meeting.

The evidence presented by the government as to Rowe's participation in the meeting was sufficient to convict Rowe. Eagan testified that Rowe was present at the meeting for all but a few minutes. Rowe's wife

testified that she was in a position to observe anyone leaving Glickman's office and that Rowe left the office only once during the meeting to take a call that lasted four or five minutes. Rowe told Eagan that Izsak's parents would pay for the bribe. He assured Eagan that only the four persons present at the meeting were aware of the bribery scheme. After Eagan left the meeting, Rowe exhibited extreme concern that Eagan might be "the heat." Rowe suggested a plan of action "to cover ourselves" if Eagan should turn out to be an undercover agent. (Footnote 2)

2. Immediately after Eagan left the meeting, Rowe called his attorney, Frank. Rowe then stated to Goldman and Glickman:

> Rowe: If she [Eagan] turned out to be the heat, we could all pick up a f . . . charge.
>
> Goldman: Well, I can tell you this. She's not — she's not the heat.
>
> Rowe: If she's not the heat, then there's no problem. But, ah, I want to be — still make sure. The way you do this in which — every — all parties are covered, and, ah, figure it out tonight.

Rowe then explained that he recognized Eagan as "a D.A. I've seen before." He warned Glickman and Goldman:

> Rowe: Listen — listen. We should wait. We should — don't tell Frank who's involved or what's involved because, like, lay the situation out, a similar situation out on the table to him and see what, ah, if he can't come up, you know, with some way to cover ourselves.

On appeal from a conviction, the evidence must be viewed in the light most favorable to the government. **Glasser v. United States**, 315 U.S. 60, 80 (1942); **United States v. Rich**, 580 F.2d 929, 934 (9th Cir.) cert. denied, 99 S.Ct. 330 (1978). All reasonable inferences from the evidence must be drawn favorably to the government. **United States v. Winn**, 577 F.2d 86, 91 (9th Cir. 1978); **Yeargain v. United States**, 314 F.2d 881, 882 (9th Cir. 1963). The conviction will be affirmed if the jurors could have rationally concluded from the evidence presented that guilt was established beyond a reasonable doubt.

Glickman: The only thing — the only thing — the only thing I wanted — wanted to — wanted to know, if it's you know, if — what happened here now, if that — if that's any part of the conspiracy.

Rowe: No. tha— Loo— see — this — if it didn't — it didn't — if it didn't go — if it didn't go any further than this, ah, there's no money exchanging hands. We haven't broke any laws yet. Yeah. But you — you know, but you — if you were the cops, you are on the way in.

Goldman: Well, I got news for you. If it had been a cop, they damn sure wouldn't have held out the way she held out.

Rowe: No. It was — see, they would — they would — have to play their cards right to get you all the way through. They couldn't — you see, if someone's smart and they smell a fish, this whole deal's gonna fall down.

United States v. King, 552 F.2d 833, 852 (9th Cir.), cert. denied, 430 U.S. 966 (1977); **United States v. Nelson**, 419 F.2d 1237, 1243 (9th Cir. 1969). Here there was abundant evidence from which the jury could rationally conclude that guilt was established beyond a reasonable doubt.

IV

After the jury began deliberations, it sent a note to the trial judge requesting additional guidance regarding the law of conspiracy. (Footnote 3) After discussing the jury note with the attorneys for all parties, the trial judge informed counsel of his proposed response. Then, the trial judge sent a note to the jury in reply. (Footnote 4) Neither of the attorneys for the appellants objected to the wording of the note.

3. The note was not a model of clarity. It read:

Judge Murray—

Is (sic) the conspiracy charge against either defendants (sic) mean that the conspiracy has to be between Glickman and Rowe only?

4. No record was kept as to what was said at the conference. Additionally, the original note of the trial judge has been lost. Sometime after trial, the judge's law clerk attempted to reconstruct the content of the note. The law clerk's reconstruction, added to the district court file, states:

No. There can be no conviction of one defendant without conviction of the other defendant in this case.

At a hearing on June 1, 1978, the trial judge stated that the law clerk's reconstruction "doesn't sound like the note that had been written," although he could not recall what the note actually said. We assume, *arguendo*, that the law clerk's reconstruction is accurate.

The defendants contend that the supplementary instruction advised the jury to convict both defendants on the conspiracy charge if it found sufficient evidence to convict either defendant. The appellants conceded that if only two persons had been charged with conspiracy in the indictment, the instruction would have been unobjectionable because the acquittal of one would require acquittal of the other. They point out, however, that the conspiracy count of the indictment charged in addition to Glickman and Rowe, "others both known and unknown to the grand jury." The appellants allege that evidence was adduced at trial linking Izsak, Izsak's family , and Goldman to the conspiracy. They argue that the jury might have found that a conspiracy existed between only one of the appellants and one or more of the unnamed members of the conspiracy, but, on the basis of the supplementary instruction, erroneously concluded that the other appellant must also be convicted of the conspiracy charge.

Because the appellants did not object to the supplementary jury instruction at trial, it cannot be challenged on appeal unless the instruction constituted plain error. United States v. Nace, 561 F.2d 763, 771 (9th Cir. 1977); Egger v. United States, 509 F.2d 745, 749 (9th Cir.), cert. denied, 423 U.S. 842 (1975); Fed.R.Crim.P. 30, 52(b). An improper instruction rarely justifies a finding of plain error. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

It is apparent from the jury's note that it was confused about a point of law. "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13 (1946).

The ultimate question is "whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors." Powell v. United States, 347 F.2d 156, 158 (9th Cir. 1965). We have noted that: "It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues." Id.

Although the question addressed to the trial judge by the jury was unclear, it appears that the jury wanted to know whether it was required to find Glickman and Rowe not guilty of conspiracy if it determined that there were members of the conspiracy other than Glickman and Rowe. The trial judge correctly replied "no" because the indictment did not charge that only the appellants were members of the conspiracy, but included "others known and unknown." A determination that there were other members of the conspiracy would not preclude a finding that Glickman and Rowe were guilty of a conspiracy.

The judge's note read as a whole was not so prejudicial as to require reversal under the plain error standard. If there was any error in the instruction, it

made the government's burden of proof even more difficult. Even on the appellants' reading of the note, the government could not obtain a conviction of one defendant unless it presented evidence of guilt sufficient to convict the other defendant as well.

The appellants' contention that the jury might have found that a conspiracy existed between only one of the appellants and one or more of the unindicted conspirators is without merit. The evidence adduced at trial showed that only Glickman and Rowe were members of the conspiracy. Both Rowe and Glickman insisted at the April 8th meeting in Glickman's office that only Glickman, Rowe, informant Goldman, and undercover agent Eagan were aware of the plan.

Glickman urges the fanciful contention that the jury, contrary to all the evidence adduced at trial, might have found that a conspiracy existed between the informant Goldman and one of the appellants. We reject this contention. There was not one shred of evidence that Goldman was a member of the conspiracy and not a government informant.

Appellants argue also that the language in the note — "in this case" — refers to the substantive charge as well as to the conspiracy charge and, thus, that the note is also an erroneous statement of the law concerning the substantive charge because one person charged as a conspirator can be convicted of the substantive offense even though all others charged as coconspirators are found not guilty.

We reject the appellants' contention that the note of the trial judge incorrectly instructed on the substantive offense. The note was a reply to the jury's request for further guidance on the law of conspiracy. There is no reasonable possibility that the jury understood the note to be an instruction on the substantive offense as well as on the law of conspiracy.

We conclude that the supplemental instruction by the court did not constitute plain error.

V

Appellants also appeal from the denial of their motion for a new trial based on newly discovered evidence. After trial, Glickman discovered three psychiatric evaluations of Goldman conducted in September 1975 and in January 1978. Appellants moved for a new trial based on newly discovered evidence. The issue raised in the motion was whether Goldman possessed the mental capability to consent to have his conversation with the appellants recorded by the government.

Appellants argue that they were denied their right to a full evidentiary hearing on their motion for a new trial. Specifically, they contend that the court prevented a meaningful hearing by refusing to allow two psychiatrists present at the hearing to testify concerning Glickman's sanity and by refusing to adjourn the hearing to allow psychiatrists to examine Goldman. At the hearing, the attorney for Glickman made an offer of proof concerning the testimony of the

two psychiatrists. Counsel stated that Dr. Sargent would testify based on his examination on September 9, 1975, that Goldman suffered from a schizophrenic disorder, paranoid type, of long standing, and was in need of further hospital evaluation and treatment. Dr. Sargent also, if called, would have testified that Goldman, as of the date of the hearing, was incompetent to be sentenced and was not able to assist properly in his defense. Counsel stated also that Dr. LaWall, on the basis of the report of January 5, 1978, would testify that, as of the date of the hearing, Goldman was incompetent to stand trial due to a major mental illness, the exact nature of which was unclear.

Notably, the offer of proof omitted any reference to Goldman's ability to consent to have his conversations with the appellants recorded by the government. Also, there was no proof offered concerning Goldman's mental state during March and April 1977, when the conversations were recorded.

There is no general requirement that a court call or hear expert testimony on the question of a witness' competency. The court has much discretion and it is not an abuse of discretion to refuse to hear such evidence. United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973). cert. denied, 416 U.S. 959 (1974).

There was no error in excluding evidence of the testimony of the psychiatrists. **The offer of proof was insufficient as a matter of law to prove that Goldman was incapable of consenting.** Even assuming the truth

of the proffered evidence, it does not show that Goldman was mentally incapable of consenting to the recordings as of March and April 1977. The district court was correct in refusing to allow the testimony of the two psychiatrists present at the meeting and in refusing to allow an adjournment to allow psychiatrists to examine Goldman.

VI

Appellants argue that even without the testimony of the two psychiatrists the record contains conclusive evidence of Goldman's incompetency to consent, thus warranting a new trial. They contend that the letters and memos of the psychiatric evaluations of Goldman lodged with the court conclusively establish Goldman's incompetency to consent. We reject this contention.

The letters and memos presented to the court were from three psychiatrists: Sargent, LaWall, and Gurland. The papers from Sargent and LaWall contained substantially the same information as was presented in the appellants' offer of proof at the hearing. Based on his January 1978 examination of Goldman, Gurland stated in his psychiatric evaluation that Goldman was incompetent to stand trial at that time and was suffering from a chronic schizophrenia condition, paranoid type. Gurland's evaluation was thus similar to LaWall's.

The extent of proof required to show that an informer consented to the monitoring or recording of a

conversation is considerably less stringent than that needed to show consent to a physical search. See United States v. Fuentes, 563 F.2d 527, 533 (2d Cir.), cert. denied, 434 U.S. 959 (1977); United States v. Bonnano, 487 F.2d 654, 658 (2d Cir. 1973). The reasons for the less stringent standard regarding conversations is that:

> In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of co-operation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him.

In order to establish consent to taping of conversations, it will ordinarily suffice for the government to show that the informant engaged in the conversation knowing that it was being taped. Id. at 658-59; United States v. Kirk, 534 F.2d 1262, 1272-73 (8th Cir. 1976). cert. denied, 433 U.S. 907 (1977).

The testimony presented at the pretrial hearing on the motion to suppress, at trial, and the tapes themselves provide abundant evidence that Goldman knew that his conversations were going to be taped, and that he agreed to have them taped.

The letters and memos of the psychiatrists filed with the motion for a new trial did not show that

Goldman was incapable of consenting. These documents were not addressed to the issue of Goldman's ability to consent to have his conversations with the appellants recorded by the government. Furthermore, the documents did not discuss Goldman's mental state at the time the recordings were made in March and April 1977, but discussed his mental state only as of 1975 and 1978.

Appellants also argue that the government had the burden of proving that Goldman had the capacity to consent to the recordings but failed to meet its burden because it failed to introduce any evidence that Goldman was sane when he purportedly consented.

We reject this argument. Finding no decisions addressed to this issue, we find guidance in principles governing the issue of the sanity of a criminal defendant. We start with the assumption that persons are sane when they give their consent to have their conversations recorded. It is not incumbent on the prosecution to prove sanity until the defense presents evidence to the contrary. See United States v. Hearst, 563 F.2d 1331, 1336 n.2 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978); United States v. Monroe, 552 F.2d 860, 863 (9th Cir.), cert. denied, 431 U.S. 972 (1977).

The offer of proof introduced by the defense was not addressed to Goldman's capacity to consent or mental state at the only relevant time — when the recordings were made. Accordingly, the evidence was insufficient to shift the burden to the prosecution to prove that Goldman had the capacity to consent. (Footnote 5)

In each appeal, the judgment appealed from is AFFIRMED.

5. *United States v. Elrod,* 441 F.2d 353 (5th Cir. 1971) and *United States v. Napier,* 451 F.2d 552 (5th Cir. 1971) are not helpful to the appellants. *Elrod* is distinguishable because *Elrod* involved a defendant's consent to the search of his hotel room and not, as here, with an informant's consent to the recording of a phone conversation. The extent of proof required to show that the informant consented is therefore less stringent. *United States v. Bonnano,* 487 F.2d at 658.

Napier is likewise inapposite. *Napier* did not establish any standards for determining whether the government has the burden of introducing psychiatric testimony to show that the informant had the mental capacity to consent. Furthermore, the trial court in *Napier* had not made a specific finding that the informant had consented to the recordings. Here, the trial court determined at a pretrial hearing on the motion to suppress that Goldman had consented to the recordings.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.s.
HAROLD GLICKMAN,
aka HAL GLICKMAN
Defendant-Apellant
No. 78-1087
78-2498

UNITED STATES OF AMERICA,
Plaintiff-Appelle,
v.s.
JAMES ROWE,
Defendant-Appellant,
No. 78-1391
78-2900
ORDER

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,*District Judge

The panel as constituted in the above case has voted to deny the petition or rehearing. Judges Trask and Wallace have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation

PROOF OF SERVICE–

State of California

County of Riverside ss

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 and not a party to the within entitled action; My business address is 1509 N. Main, Santa Ana, California 92701.

I served the within
PETITION FOR WRIT OF CERTIORARI
on the
interested parties in said action, by placing a true copy in each of 2 sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

U.S. Solicitor General
Department of Justice
Washington, D.C. 20530

Paul Flynn
U.S. Attorney
Central District of California
312 North Spring,
U.S. Court House
Los Angeles, Calif.

I CERTIFY under penalty of perjury that the foregoin is true and correct. Executed on December, 1979 at Santa Ana, California.

JACK GALLAGHER